Supreme Court, U.S.
FILED
NOV 7 2001

No. 01-248

IN THE

Supreme Court of the United States

ULSTER HOME CARE INC., *et al.*,

Petitioners,

-and-

DANIEL RUBIN,

Petitioner,

v.

ELIOT SPITZER,
as Attorney General of the State of New York,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION

Of Counsel:

CAITLIN J. HALLIGAN*
Solicitor General

PETER B. POPE
Deputy Attorney General
Criminal Division

DANIEL SMIRLOCK
Deputy Solicitor General

ELIOT SPITZER
Attorney General of the
State of New York
120 Broadway
New York, New York 10271
(212) 416-8020

**Counsel of Record*

Attorneys for Respondent

170480

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the orders of the New York Court of Appeals in these two connected cases involving a facial vagueness challenge to a state regulation — in one of which the court remitted the case to a lower court for consideration of additional facts and issues not raised in the Court of Appeals, and in the other of which litigation over both a preliminary injunction and an "as applied" challenge to the regulation is likewise ongoing — are unreviewable under 28 U.S.C. § 1257 because they are not final judgments?

2. Whether, in reviewing (a) a conviction for offering a false instrument for filing and larceny by false pretenses and (b) an action to enjoin a prosecution for the same offenses, the court below applied the correct standard in rejecting a facial vagueness challenge to the state regulation underlying both the conviction and potential prosecution?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Opinions Below	1
Additional Statutes Involved	1
Counterstatement of the Cases	3
Reasons for Denying the Writ	6
I. This Court Lacks Jurisdiction Because Neither *Rubin* Nor *Ulster* Is A Final Judgment.	6
II. Notwithstanding Petitioners' Mischaracterization Of The Decisions Below, The Court Of Appeals Did Not Err In Applying This Court's Precedents.	8
A. The Court of Appeals applied precisely the test for vagueness that petitioners assert is correct.	9

Contents

Page

B. The Court of Appeals did not hold that State regulations are immune to vagueness challenges in criminal prosecutions, but instead reviewed and upheld the regulation at issue. 10

C. The Court of Appeals did not ignore controlling precedent. 12

Conclusion 13

TABLE OF CITED AUTHORITIES

Page

Cases:

Bryson v. United States, 396 U.S. 64 (1969) 10, 11

Chicago v. Morales, 527 U.S. 41 (1999) 9, 10

Connally v. General Construction Co., 269 U.S. 385 (1926) 12

Dennis v. United States, 384 U.S. 855 (1966) 11

Florida v. Thomas, 532 U.S. 774 (2001) 7

Hill v. Colorado, 530 U.S. 703 (2000) 9, 10

Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925) 12

Rescue Army v. Municipal Court, 331 U.S. 549 (1947) 7

United States v. Salerno, 481 U.S. 739 (1987) 9, 10

United States Constitution:

First Amendment 1, 8

Cited Authorities

Page

Statutes:

28 U.S.C. § 1257 ..... i, 6

New York Penal Law § 155.05 2

New York Penal Law § 155.40(1) 2

New York Penal Law § 175.35 2

N.Y. Comp. Codes R. & Regs. tit. 18, § 505.14(h)(7)(ii)(a)(1) (2001) 4

N.Y. C.P.L.R. § 2221(e)(2) (McKinney 1991 & Supp. 2001) 8

N.Y. C.P.L.R. § 5015(a)(5) (McKinney 1992) 8

Other Authority:

N.Y. Crim. Proc. art. 190 (McKinney 1993) 8

Daniel Rubin ("Rubin") and Ulster Home Care Inc. and two of its executives ("Ulster") have asked this Court to review two decisions issued by the New York Court of Appeals, New York's court of last resort. Rubin seeks to overturn an affirmance of his criminal convictions for grand larceny and offering a false instrument for filing. Ulster seeks to overturn a denial of declaratory relief that would preclude a prosecution under the same statutes. Petitioners' primary argument is that the Court of Appeals applied the incorrect constitutional standard in evaluating for vagueness an administrative Medicaid regulation that informs the larceny conviction of Rubin and the potential prosecution of Ulster. According to petitioners, the legal standard for reviewing non-First Amendment facial challenges on vagueness grounds has produced conflicting decisions and should be clarified.

The petition should be denied. First, this Court lacks jurisdiction because both decisions by the Court of Appeals are non-final. Second, review is not warranted because the Court of Appeals employed the very constitutional test that petitioners urge is correct and in no way erred in applying this Court's precedents.

OPINIONS BELOW

The opinion of the New York Court of Appeals in *People v. Rubin*, Pet. App. at 6a-10a, is unreported. The opinion of the court in *Ulster Home Care, Inc. v. Vacco*, Pet. App. at 1a-5a, is reported at 96 N.Y.2d 505.

ADDITIONAL STATUTES INVOLVED

Rubin and Ulster omitted from their petition the New York Penal Law provisions that were the subject of the grand jury investigation and petit jury conviction:

Penal Law § 155.05 (Larceny; defined)

1. A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

2. Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subdivision one of this section, committed in any of the following ways: (a) By conduct heretofore defined or known as common law larceny by trespassory taking, common law larceny by trick, embezzlement, or obtaining property by false pretenses . . . .

Penal Law § 155.40(1) (Grand larceny in the second degree)

A person is guilty of grand larceny in the second degree when he steals property and when . . . [t]he value of the property exceeds fifty thousand dollars . . . .

Penal Law § 175.35 (Offering a false instrument for filing in the first degree)

A person is guilty of offering a false instrument for filing in the first degree when, knowing that a written instrument contains a false statement or false information, and with intent to defraud the state or any political subdivision, public authority or public benefit corporation of

> the state, he offers or presents it to a public office, public servant, public authority or public benefit corporation with the knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office, public servant, public authority or public benefit corporation.

COUNTERSTATEMENT OF THE CASES

Two cases are presented here for review, each implicating a prosecution under penal laws of general applicability in New York State — the statutes prohibiting larceny and offering a false instrument for filing. Rubin was convicted after a jury trial, and the Court of Appeals has upheld the conviction and remitted the case for consideration of other issues not addressed by the intermediate appellate court. Ulster was the subject of a criminal investigation until it brought a civil action seeking declaratory judgment and injunctive relief staying any prosecution or enforcement action. The trial court granted Ulster a preliminary injunction on the basis of its vagueness challenge, but later denied its motion for summary judgment seeking declaratory relief. Only the summary judgment decision was appealed, and the Court of Appeals has now upheld the denial of summary judgment and remitted the case for further proceedings.

The gravamen of both offenses was larceny from the Medicaid program by false pretense — specifically, by deceitful overbilling. Both petitioners defended by challenging as facially vague the underlying Medicaid administrative regulation that sets forth the billing standard. That regulation provides in pertinent part: "Medical assistance payments . . . are made at the lower of the following rates: (i) the rate the

provider charges the general public for personal care services; or (ii) the rate determined by the department . . . ." N.Y. Comp. Codes R. & Regs. tit. 18, § 505.14(h)(7)(ii)(a)(1) (2001).

This regulation embodies a basic rule of the Medicaid program: that a provider may not charge the government a higher fee for services than it charges the general public. This rule, known as the "public charge" rule, exists to prevent providers from exploiting the public fisc by charging the state at above-market rates. The theory of both cases was that the petitioners charged Medicaid higher rates than it charged self-paying patients, and made a series of false written statements to execute and conceal the overbilling.

In motion practice and as a factual "intent" defense at trial, petitioners argued that the vagueness of the regulation precluded a determination that they intended to commit fraud. Specifically, petitioners attacked as vague the word "rate" and the phrase "the general public." New York's intermediate appellate court agreed with petitioners, finding the regulation unconstitutionally vague on its face, reversing six counts of Rubin's eight counts of conviction, and granting summary judgment to Ulster on its declaratory relief action.

The Court of Appeals reversed the intermediate court in both cases. In *Rubin*, the court affirmed the convictions. Noting that it had already declared the public charge regulation "facially valid" in *Ulster*, Pet. App. at 8a, the court proceeded also to find that the regulation was not impermissibly vague "[a]s applied to" Rubin. Pet. App. at 9a. The court based this conclusion on, among other things, evidence that Rubin "understood the public charge regulation and yet created schemes to conceal his violation of it" and

"instructed his staff" to engage in specific falsehoods. Pet. App. at 9a. Litigation is ongoing in this case. The Court of Appeals remitted for the Appellate Division to resolve undetermined questions of fact and law. After the Appellate Division did so, Rubin sought both reargument in the intermediate court and leave to appeal in the Court of Appeals. Both of these applications are pending.

In *Ulster*, the court reversed the grant of summary judgment to petitioner. It held that the regulation was not unconstitutionally vague on its face because it could be understood by "a person of ordinary intelligence" and was not amenable to arbitrary enforcement. Pet. App. at 4a. The court additionally noted that Ulster was not subject to prosecution for violating the regulation, but rather for larceny and offering a false instrument for filing. Unlike the administrative regulation itself, these felonies have a statutory requirement that a defendant engage in "a knowing attempt to deceive or defraud." Pet. App. at 4a-5a. Plaintiffs therefore were not entitled to summary judgment absent a showing "that the regulation was unconstitutional as applied to them." Pet. App. at 4a. Although the preliminary injunction was not brought up for review, the Court of Appeals nonetheless opined that "it was error to enjoin [Ulster's] criminal prosecutions." Pet. App. at 5a. The court remitted the case to the trial court for further proceedings. It did not vacate the preliminary injunction, which remains fully in effect and, as with the proceedings in *Rubin*, is the subject of an ongoing appeal.

REASONS FOR DENYING THE WRIT

This Court should decline review for two reasons. First, neither *Rubin* nor *Ulster* has produced a final judgment and therefore jurisdiction does not lie pursuant to 28 U.S.C. § 1257. Second, even if these judgments were final, petitioners have misstated their holdings in order to suggest a conflict where none exists. In fact, the Court of Appeals applied precisely the constitutional test that petitioners urge is correct. Thus, even if there were a doctrinal split on this issue, it would not be implicated in these cases.

I. THIS COURT LACKS JURISDICTION BECAUSE NEITHER *RUBIN* NOR *ULSTER* IS A FINAL JUDGMENT.

Pursuant to 28 U.S.C. § 1257(a), this Court may review state court decisions only with respect to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . ." Because neither *Rubin* nor *Ulster* has produced a final judgment, this Court lacks jurisdiction and petitioners' application must be denied.

In *Rubin*, the Court of Appeals remitted the case to the Appellate Division for consideration of the facts and issues raised but not determined on the appeal to that court. Pet. App. at 10a. Those issues, which include a challenge to the sufficiency of the evidence, remain unresolved. After the Appellate Division addressed them in an August 30, 2001 decision, *see People v. Rubin*, 729 N.Y.S.2d 561 (3d Dept. 2001), petitioner made two additional applications: (1) a motion for reargument in the Appellate Division and (2) a motion for leave to appeal in the Court of Appeals. Both applications are pending, and, as a consequence, *Rubin* is not final.

Ulster, in which the Court of Appeals upheld denial of a summary judgment motion, is also non-final because litigation continues over both the "as applied" challenge and the preliminary injunction initially issued by the trial court. Observing that the Appellate Division's earlier affirmance of the preliminary injunction was "not brought up for review," Pet. App. at 3a n.2, the Court of Appeals remitted the case to Supreme Court, Ulster County for further proceedings, Pet. App. at 5a. The State moved to vacate the preliminary injunction, and its motion was granted by order of the Supreme Court on August 10, 2001. Ulster then moved in the Appellate Division for a stay of that order pending appeal, arguing that the injunction is law of the case and should remain in effect while Ulster's "as applied" claim is resolved. Ulster was granted a stay on September 21, 2001, but has not yet perfected its appeal. Thus, litigation on petitioner's "as applied" challenge remains pending, the injunction against enforcement remains in place, and petitioners are still prosecuting an appeal. This is precisely the situation faced by the petitioner in *Florida v. Thomas*, 532 U.S. 774 (2001), where this Court dismissed a case for lack of jurisdiction because, in further proceedings, the petitioner might yet prevail on a separate, related constitutional ground, thereby mooting the need for review of the issue on which certiorari had been granted.

Even if *Ulster* were considered to be final, strong prudential reasons would dictate that review by this court would be premature. Too many issues are still abstract and the question of the interplay between the facts and New York's statutes remains wholly unresolved. *See Rescue Army v. Municipal Court*, 331 U.S. 549, 574-85 (1947) (although judgment was final, Court declines to exercise jurisdiction in writ of prohibition action because issues are abstract and

speculative, and interdependent statutory provisions not yet clearly interpreted). Here, before there can even be a trial, there must first be either a presentation of competent admissible evidence to a New York State grand jury followed by the grand jury's decision to vote a true bill, *see* N.Y. Crim. Proc. Law art. 190 (McKinney 1993), or reinstatement of the previously dismissed indictment, *see* N.Y. C.P.L.R. § 2221(e)(2) (McKinney 1991 & Supp. 2001) (motion for leave to renew); N.Y. C.P.L.R. § 5015(a)(5) (McKinney 1992) (relief from judgment or order). If one of these events occurs, then — under the rule set forth by the Court of Appeals in the *Rubin* case — Ulster may still challenge the vagueness of the regulations, both in pretrial motions to dismiss on constitutional "as applied" grounds and as a factual intent defense at trial.

II. NOTWITHSTANDING PETITIONERS' MISCHARACTERIZATION OF THE DECISIONS BELOW, THE COURT OF APPEALS DID NOT ERR IN APPLYING THIS COURT'S PRECEDENTS.

Petitioners contend that this Court should grant certiorari to resolve a purported conflict about the standard for reviewing vagueness challenges that do not implicate the First Amendment. Yet the Court of Appeals applied exactly the standard that petitioners propose in their application to this court. Petitioners' additional objections to the decisions below — that the Court of Appeals has insulated all criminal prosecutions from vagueness challenges and failed to apply a case involving a vagueness challenge to another statute — are similarly without merit.

A. The Court of Appeals applied precisely the test for vagueness that petitioners assert is correct.

The supposed conflict in this Court's jurisprudence that is the basis of the petition is not implicated by these cases. Petitioners ask this Court to grant certiorari because they assert that the Court of Appeals failed to apply the standard set forth in *Chicago v. Morales*, 527 U.S. 41 (1999), for a facial constitutional challenge for vagueness. Petitioners claim that the Court of Appeals instead applied the more stringent rule set forth in *United States v. Salerno*, 481 U.S. 739 (1987). The flaw in petitioners' argument is that the court did not apply the *Salerno* test, but rather the more liberal *Morales* formulation that they assert is correct.

In *Morales*, this Court held that "[v]agueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *Morales*, 527 U.S. at 56 (citation omitted). A more recent decision, ignored by petitioners, is to the same effect:

> A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.

Hill v. Colorado, 530 U.S. 703, 732 (2000) (citing *Morales*, 527 U.S. at 56-57).

Petitioners assert that the Court of Appeals' failure to apply the more generous *Morales* test was error. Their argument depends on the contention that the New York Court of Appeals applied not this test, but a more stringent standard set forth in *Salerno*, 481 U.S. at 745, under which the challenger must establish "that no set of circumstances exists under which the Act would be valid." In fact, contrary to petitioners' assertions, the Court of Appeals applied the *Morales/Hill* test. It concluded that petitioners' challenge failed to satisfy either part of that test. The court held: "Neither the term 'general public' nor 'rate' as used in the regulation is so vague that it could not be understood by a person of ordinary intelligence or could be arbitrarily enforced." Pet. App. at 4a.

Because the Court of Appeals employed the test petitioners concede is proper, this case is an inappropriate vehicle for resolving any alleged split between *Morales/Hill* and *Salerno*.

B. The Court of Appeals did not hold that State regulations are immune to vagueness challenges in criminal prosecutions, but instead reviewed and upheld the regulation at issue.

The Court of Appeals did not hold, as petitioners suggest, that regulations "may not even be tested for vagueness" in a criminal prosecution. Pet. at 23. Petitioners suggest that the court applied *Bryson v. United States*, 396 U.S. 64 (1969), as "a bar to judicial review of certifications [of regulatory compliance] which incorporate by reference vague legal provisions." Pet. at 23. The court, however, not only reviewed the public charge regulation for facial vagueness, but also explicitly allowed defendants to challenge the regulations "as applied to them." Pet. App. at 4a; *see also id.* at 9a. Thus,

the Court of Appeals' supposed failure to permit a vagueness challenge to the regulation cannot support a grant of certiorari.

Even if the Court of Appeals had not fully considered petitioners' vagueness challenge — which it plainly did — the court would have correctly concluded that, in a case alleging deliberate deceit as a means of self-help, a defendant cannot "escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional." Pet. App. at 5a (quoting *Bryson v. United States*, 396 U.S. 64, 68). This Court has repeatedly held that when an indictment charges a defendant with lying to evade a statutory requirement, "a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit." *Bryson*, 396 U.S. at 68 (refusing to adjudicate, *inter alia*, vagueness challenge to conviction for making a false statement in affidavit filed to comply with requirement of National Labor Relations Act). Where there is "an effort to circumvent the law and not to challenge it — a purported compliance with the statute designed to avoid the courts, not to invoke their jurisdiction" — it "is no defense to a charge based upon this sort of enterprise that the statutory scheme sought to be evaded is somehow defective." *Dennis v. United States*, 384 U.S. 855, 865-66 (1966).

Petitioners here seek to do precisely what precedent prohibits — to elude prosecution under New York's statutes regarding larceny and the offering of false instruments by alleging that the regulation that they evaded through intentional falsehoods is defective. The Court of Appeals properly noted that such an attempt to circumvent the law bars any injunction of the underlying criminal proceedings on vagueness grounds. Pet. App. at 5a.

C. The Court of Appeals did not ignore controlling precedent.

Contrary to petitioners' contentions, the decisions of the New York Court of Appeals are far from "flatly contrary," Pet. at 27, to this Court's decision in *Connally v. General Construction Co.*, 269 U.S. 385 (1926). Indeed, *Connally* reflects the common-sense proposition that the outcome of a vagueness challenge to one statute cannot be dispositive of a challenge to another statute with different terms: "The precise point of differentiation [between vague and valid statutory terms] in some instances is not of easy statement." *Id.* at 391. A determination that the terms "current rate of wages" and "locality" are impermissibly vague, *see id.* at 393-95, sheds little light on whether the terms in New York's public charge regulation can be reasonably understood or permit arbitrary enforcement.

Moreover, *Connally* itself notes that this Court has upheld statutes that "employ[ ] words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them." *Id.* (citing *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 502 (1925)). The Court of Appeals held that the public charge regulation uses exactly such phrases: The regulation "has a common understanding and is used in other State Medicaid and Medicare programs." Pet. App. at 4a (citation omitted). Petitioners' disagreement about whether the language of the regulation is indeed commonly understood by home personal care providers is a fact-bound question not worthy of review by this Court. Regardless, as discussed above, *see supra* at 9-10, petitioners cannot rely on a vagueness challenge to escape the consequences of deliberate misstatements intended to evade relevant regulatory requirements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:

CAITLIN J. HALLIGAN*
Solicitor General

PETER B. POPE
Deputy Attorney General
Criminal Division

DANIEL SMIRLOCK
Deputy Solicitor General

ELIOT SPITZER
Attorney General of the
State of New York
120 Broadway
New York, New York 10271
(212) 416-8020

**Counsel of Record*

Attorneys for Respondent